

Q. S. 83/1983

IEJ/SH

SOCIAL SECURITY ACTS 1975 TO 1982

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: [REDACTED]

Local Tribunal: Rotherham

Case No: [REDACTED]

*Commissioner rebuts simple pos
suggested by DHSS in an incapacity
for work case.*

1. (1) This is a claimant's appeal from the unanimous decision dated 16 December 1982 of a local tribunal ("the tribunal") brought by my leave. The tribunal upheld the decision dated 26 April 1982 of an insurance officer that invalidity pension was not payable from 28 April 1982 to 3 May 1982 (both dates included) because the claimant had not proved that he was incapable of work by reason of some specific disease or bodily or mental disablement; and also decided, in the same sense, referred questions on the same issue in respect of later periods. In its overall result their decision held invalidity pension not to be payable, by reason of failure to establish incapacity for work, for the aggregate period from 28 April 1982 to 13 September 1982 (both dates included). The claimant has been assisted upon his present appeal by Mr H. Beynon, a Project Leader with The Children's Society, whose assistance has included both the compilation of additional relevant information on matters of fact and the submission of cogent written argument, and I am much indebted to Mr Beynon for the assistance which his efforts have afforded me in arriving at my own decision.
- (2) The appeal succeeds. My decision is that invalidity pension is payable for the aggregate period from 28 April 1982 to 13 September 1982 (both dates included) because the claimant has proved that he was incapable of work by reason of some specific disease or bodily or mental disablement throughout such period: Sections 15(1) and 17(1)(a)(ii) of the Social Security Act 1975 ("the Act").

2. The claimant, who attained 53 years of age on 29 April 1982, was at all material times in receipt of a service disability pension, but had nevertheless pursued down to 8 September 1980 - and despite his development with progressive severity of the condition "ankylosing spondylitis" - many years of a civilian career as a milk roundsman. As from 8 September 1980 he gave up that work, did not thereafter resume it, and had entered into receipt first of sickness benefit, and thereafter invalidity pension, down to 27 April 1982. He continued at all material times thereafter to claim invalidity pension in reliance upon MED 3 certificates furnished by his own doctor; but has not been paid that benefit for any of the material dates by reason, in combination, of the insurance officer's decision above mentioned, the referrals above mentioned, and the tribunal's decision thereon.

3. It is convenient to interpose at this point that there are indications on the case file, which, though less than complete, suggest that the claimant may have received payments of unemployment benefit for dates within the aggregate period the subject of my decision above; and pursuant to section 86(2) of the Act I direct that if and so far as the claimant has in respect of any date within the period to which my decision above relates already received any unemployment benefit, that be treated as paid on account of the invalidity benefit now awarded for the same date.

4. Under the operation of routine control procedures applied when a claimant has been in receipt of sickness or invalidity benefit for a protracted period, the claimant was examined on 22 February 1982 and 21 April 1982 by (different) examining medical officers on behalf of the Divisional Medical Officer. In the opinions of both he was incapable of work in his antecedent regular occupation as a milk roundsman by reason of his condition of ankylosing spondylitis but was, they considered, nevertheless capable of other work "within limits". The first examining officer considered that the claimant should avoid working conditions involving driving or working at heights, but that he was capable of (unspecified) light work which did not involve reaching above the shoulder level or much bending, but also expressed the view "E.R.C. not indicated" (That indicates his view as to whether or not an employment rehabilitation course might be of assistance to the claimant). A second examining officer expressed a similar view as to E.R.C. and working at heights, but indicated in regard to working conditions to be avoided only "driving - not HGV", expressing under "general remarks" the observations "a pleasant well motivated man who is used to the outdoor life. Neck range is good enough to permit light van driving but should avoid bending and heavy lifting. Could manage simple clerical work, intelligent."

5. (1) At an initial hearing of his appeal to the tribunal the claimant indicated that he could drive, but only for short distances and that he could not stand or sit for long periods without a change of position; but he sought and obtained an adjournment in order to produce a consultant's report which had been rendered in respect of him.
- (2) At the adjourned hearing he produced what is clearly a "cut" version (in the sense that it is undated and the identity of the consultant who gave it is not shown) of a report upon his condition by a consultant physician in rheumatology, internal evidence in which identifies the report as having been rendered during the year 1981 and prior to October in that year. It is also apparent from the tenor of the report that it was rendered in reference to a possible link between the claimant's condition of ankylosing spondylitis and his having suffered from rheumatic fever during his time in the services. The report did not substantiate any such link, but is in my view of substantial evidential value in regard to the issues with which I am concerned once it is appreciated that (as is not in controversy in the present case) ankylosing spondylitis is a degenerative condition.
- (3) The report describes the claimant as a slightly built man, who appeared to be a reliable medical witness, and showed a typical spondylitic posture of the advanced disease with a dorsal kyphosis. Chest expansion nil. Spinal movement, including lateral flexion, extension and forward flexion and rotation, virtually nil. Cervical spine movements limited, all planes. Both hips limited inflexion, abduction and

rotation, other peripheral joints normal. As to diagnosis it indicates "he had typical advanced ankylosing spondylitis. This is based on classical clinical features plus typical X-ray changes. The disease not only affects his spine, but there are also substantial arthritic changes in the left hip. The consultant's comments included:-

"The particular significance of his disease in addition to the spinal involvement, rests on the fact that he now has left hip disease which is likely to impair him further in the future. The usual advice to spondylitics is "keep going at all costs", but progressive hip disease would hamper best intentions regarding this. In my view the nature of this patient's arthritic complaint would be such that he should be able to hold down a light job, such as helping his wife with a small business in the future, but I do not think there is much chance that he will ever be able to return to his normal occupation as a milkman which he stoically held down for so many years, despite substantial disability".

6. (1) In accordance with case law authorities which have not been the subject of controversy in the present case (and are set out in the written submissions by insurance officers on the case file, of which the claimant has been furnished with copies) "work" means work which a claimant can reasonably be expected to perform and for which an employer would pay. And where, as in the present case, a claimant has been in receipt of sickness or invalidity benefit for a substantial period of time it is appropriate to look beyond any former regular occupation of his and consider the whole field of employment in evaluating his capacity or incapacity for work.
- (2) Whilst the burden of proving incapacity for work rests upon a claimant, it is a convenient course, where issues as to incapacity for all work are in play, for presenting officers, and those concerned with the preparation of written submissions, to identify - and, helpfully, with "job descriptions" in support - any particular occupation of which they contend a claimant should be regarded as capable notwithstanding his own contentions as to there being none such.
7. (1) Though the chairman's note of evidence given at the tribunal's adjourned hearing records that the claimant stated that he could drive but only for short distances, and could not stand or sit for any length of time without a change of posture, the tribunal have recorded as "findings of tribunal on questions of fact material to decision" only "the balance of medical opinion was that the applicant was capable of light work"; and one cannot therefore say with certainty whether they accepted the claimant's own evidence or not.
- (2) So, also, the tribunal's stated "reasons for decision" do not demonstrate any close consideration as to what, if any, work the claimant could do for which an employer would be prepared to pay, upon a practical assessment taking due account of his incapacities. The stated reasons are (in full)

"although the applicant was clearly incapacitated the medical evidence on balance supported the view that he could do some light work".

8. The adjudication officer now concerned has, in response to an interlocutory direction given by me, given closer consideration to that aspect of the matter and has put forward as the suggested occupations of which the claimant was capable at the material times the following:-

- (i) Working in a clerical or office capacity with a dairy or milk supplier, doing some accounts, ordering supplies and taking telephone orders etc, but with no lifting of milk crates or unloading or loading of supplies;
- (ii) Work as a newspaper seller working from a "pitch" or a stand and selling to the general public, not involving heavy lifting and allowing the claimant to change his position and even to sit down for periods of time;
- (iii) Car park attendant;
- (iv) Garage forecourt attendant taking payments in a self-service type garage;
- (v) Doorman at a social club or similar, checking membership cards, issuing literature etc;
- (vi) Attendant at a sports hall or museum or similar establishment, giving directions, issuing tickets etc, but not involving the climbing of stairs.

9. (1) Before referring to the evidence and submissions on the claimant's behalf in particular relation to those suggested occupations, I should here mention that the evidence now before me includes a letter from the claimant's own doctor, not before the tribunal, which is dated 15 February 1983 and was bespoken on his behalf by Mr Beynon primarily with regard to the claimant's appeal to a local tribunal for a period commencing 14 September 1982 against a refusal of sickness or invalidity benefit on grounds of failure to prove incapacity for work, which appeal has in fact succeeded. I have taken that letter into consideration but with appropriate regard to the circumstance that it is written in reference to the claimant's condition some months later than the period with which the present appeal is concerned. It is nevertheless of material assistance in so far as it indicates that the claimant's own doctor had by February 1983 been attending him in connection with his ankylosing spondylosis for some 5 years then past and because it indicates that, by mid-February 1983 the claimant could look forwards only by slightly flexing his knees to compensate for his spinal condition; was unable to carry any weight in his arms; could not do prolonged standing as required in bench work nor sitting at a desk; could not reach up without incurring imbalance; and appeared to the doctor also to be getting slow mentally. Writing at the date I have indicated

the claimant's own doctor considered, in unqualified terms, that the claimant was "unfit for work", his attention having been specifically directed to suggestions as to light van driving, simple clerical work, work of a semi-sedentary nature, bench or assembly work, and warehouse despatcher.

(2) It is convenient to make clear at this point also that I am not assisted by the reference in the unnamed consultant's report to the possibility of the claimant "assisting his wife in her small business" as there was no evidence before the tribunal as to any such business having subsisted into any period with which I am concerned, and none has been adduced before me - indeed it appears that whatever business the wife had at one time was closed down before any date with which I am concerned.

(3) I am, however, both assisted and governed in arriving at my decision by the passage in the Tribunal decision R(S)11/51, which I accept as authority binding on me, which indicates:-

"A person is incapable of work ... if having regard to his age, education, experience, state of health, and other personal factors there is no work or type of work which he can reasonably be expected to do. By 'work' in this connection we mean remunerative work, that is to say work, whether full-time or part-time, for which an employer would be willing to pay ..."

10. (1) Mr Beynon has indicated, and I accept:-

(1) that the claimant has no educational qualifications, and had worked almost continuously for over 20 years as a milk roundsman, such work consisting in delivering milk to the customer's doorstep and keeping a record of deliveries and money collected;

(ii) that although there is some material conflict between the views of the examining medical officers and those of the claimant's own doctor (constituted primarily by the latter continuing to issue at all material times MED 3 certificates) as to the claimant's incapacity for work, there is also a consensus of medical evidence clearly establishing substantial physical impairment of normal capacities - including that the claimant has either substantial impairment or no function at all as regards climbing stairs, ladders, bending, lifting and carrying, and that work should not involve reaching above shoulder height or bending.

(2) As regards the area of conflict, Mr Beynon points out also that a claimant's own doctor who has been regularly attending him over a period of years, and whose attention is directed to the question of incapacity for work on a broader front than as to capacity only for the claimant's former regular occupation, may well have a closer insight into a claimant's capacities than can be formed on brief examination by an examining medical officer on a single occasion.

11. (1) I discard also at this point the earlier suggestions that the claimant was at material times capable of work in the occupation of driver of a goods vehicle other than HVG, or as a light van driver, which have not been pursued by the adjudication officer now concerned, and were by necessary inference rejected by the tribunal as valid. The practical reality is that a goods or light van driver is required to drive for a number of hours a day interspersed with collections and deliveries involving degrees of manual effort and sustained activity remotely outside the claimant's impaired capacities at any material time.

(2) Similarly I discard bench or assembly work, which also have not been actively pursued on the present appeal and were in my judgment occupations requiring capacities for sustained activity, sitting or standing at a workbench or assembly line, of which the claimant was at all material times incapable and which he could not reasonably be expected to do, having regard both to his difficulties of movement and to his need to ease his position frequently.

12. As to the remaining occupations put forward, Mr Beynon deals first with that of clerical worker. As to that he points out the claimant's lack of qualifications and experience for any similar work, stressing that such work as is required by an employer of an employee involves both prolonged sitting and the application of aptitude considerably in excess of that demonstrated by experience in keeping a milk roundsman's "book". I accept Mr Beynon's submission that the claimant was not capable of work as a clerical worker. So also as to any form of warehouse work not involving physical effort in respects in which it is common ground the claimant had seriously impaired capacity.

13. As regards the occupation of newspaper seller, Mr Beynon submits, and I accept, that the seller of newspapers from a stand has to handle substantial weights of papers delivered or collected in bulk for resale, has to mount and demount his "stand" if he has one, or to carry his "ready use" supply with him if he has not, and has - in sum - to undertake activities of bending, lifting and carrying weights beyond the claimant's capacities. I therefore reject the contention that the claimant was capable of this occupation at the material times.

14. As regards car park attendant, Mr Beynon submits (and I have no reason to doubt) that this is normally worked in 12 hour shifts; that if working from a booth or stall the space is cramped; and that during busy periods there is little opportunity to move. The duties also normally involve periodic tours of inspection around the parking area, which may be outdoor or multi-storey, and that involves a substantial degree of walking, with or without frequent climbing of stairs in addition. I accept the submission that this occupation also was plainly beyond the claimant's capacities.

15. As to forecourt attendant at a "self service garage" (I take this to mean primarily, if not exclusively, a petrol filling station, as distinct from a repair garage) the insurance officer's submission makes reference only to "taking money". But it is general knowledge that under modern conditions such attendants are expected to cope with operating electronic equipment for re-setting pumps, giving instructions or warnings by loudspeaker, to deal with payment by credit card or account as well as

cash, and to assist those who experience difficulty in serving themselves to complete their purchases. In addition, inquiries instigated by Mr Beynon have established that in addition to duties within the "paying booth", forecourt attendants are required to re-stock shelves with sweets, oil, spare-parts etc, clean windows, floors and petrol pumps, see to the availability and proper order of fire buckets, water buckets, litter bins and so forth during hours of opening, to secure such of these as are movable when the premises close, and to reinstate them in position upon daily opening. Even if the claimant could undertake the full range of duties within the paying booth the work may fairly be said to entail, in one context or another, bending, carrying, lifting, and raising arms above shoulder height - activities in which the claimant is for all practical purposes incapacitated. I therefore reject this occupation also as one of which the claimant was capable at any material time.

16. As to the occupation of doorman at a social club, it is at the result of enquiries instigated by Mr Beynon in my judgment sufficiently demonstrated that the required duties are not in reality limited to checking membership cards on admission and supplying literature. Apart from the possibility of having to deal with aggressive customers, or would-be customers, doormen are expected to handle deliveries of small items, carry extra chairs and tables, carry out the checking of fire exits, and organise an orderly exodus in the event of fire. Whilst therefore I accept that were the occupation confined to the duties contemplated by the insurance officer it would be an occupation of which the claimant was capable at the material times, I do not, as the evidence stands before me, accept the insurance officer's premise as to the nature of the duties. And, evaluated in accordance with the evidence now available, this occupation also falls in my judgment to be rejected in the material contexts.

17. Upon the evidence obtained by Mr Beynon a similar analysis leads to the same conclusion in regard to the occupation of attendant at a sports hall, museum or similar establishment. The insurance officer's premise is that the duties would be confined to giving directions, issuing tickets etc, and not involving the climbing of stairs. Mr Beynon has produced detailed actual "job descriptions" which clearly demonstrate that although the specific duties may include the particular tasks relied upon by the insurance officer the "job requirements" go significantly wider. The work is regarded primarily as a form of security work, with duties frequently rotated to avoid undue boredom, and the range of duties frequently includes protracted periods of standing and "tours of inspection" involving considerable walking and climbing stairs. Such attendants are also expected to deal with any disturbance or emergency which may occur.

18. The information gleaned by Mr Beynon extended also to the associated field of leisure centre attendant and sports centre attendant. Both of those occupations involve in addition to the particular tasks suggested by the insurance officer the handling of equipment on issue and return and competence in dealing with any disturbance or emergency that may arise. It is fair to add that in such establishments there are also - but as a distinct category of employment - clerical posts which may be combined with the sort of duties envisaged by the insurance officer. But where that is so, competence in typing and/or simple book-keeping is additionally necessary, as also the ability to remain engaged sedentarily in productive work without undue interruption; and having regard to the

claimant's physical condition, and his lack of qualifications and relevant experience, I rule out as occupations of which he was capable at the material times both the "main streams" of these categories of employment and the additional sub-categories last dealt with.

19. At the end of the day I am left with the clear conclusion that no occupation has been cited of which the claimant was, in realistic practical terms, capable at any of the material times; and that, as between the respective views of the examining medical officers on the one hand and the claimant's own doctor on the other, it is proper for me to reach the conclusion that the claimant's own doctor was right in certifying him incapable of work at all material times. Accordingly the claimant has in all the circumstances effectively established incapacity for work of any kind which he could reasonably be expected to do and for which an employer would pay during the material period.

20. My decision is accordingly as indicated in paragraph 1(2) above, with which is to be read my direction in paragraph 3 above.

(Signed) I Edwards-Jones
Commissioner

Date: 19 June 1984

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C I O File: I.O. 8101/V/83
Region: North Eastern